



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 204**

**[Docket DARS-2018-0029]**

**RIN 0750-AJ76**

**Defense Federal Acquisition Regulation Supplement: Contract  
Closeout Authority (DFARS Case 2018-D012)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed Rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act for Fiscal Years 2017 and 2018 to permit expedited closeout of certain contracts entered into on a date that is at least 17 fiscal years before the current fiscal year.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2018-D012, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS

Case 2018-D012" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2018-D012." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2018-D012" on your attached document.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2018-D012 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Moore, telephone 571-372-6093.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This rule proposes to revise the DFARS to implement section 836 of the National Defense Authorization Act (NDAA) for Fiscal

Year (FY) 2017 (Pub. L. 114-328), as modified by section 824 of the NDAA for FY 2018, which authorizes the Secretary of Defense to close out certain contracts or groups of contracts through modification of such contracts without completing a reconciliation audit or other corrective action. The authority provided by sections 824 and 836 applies to contracts entered into on a date that is at least 17 fiscal years before the current fiscal year, that have no further supplies or services due, and for which a determination has been made that the contract records are not otherwise reconcilable, because—

- The contract or related payment records have been destroyed or lost; or
- Although contracts records are available, the time or effort required to establish the exact amount owed to the U.S. Government or amount owed to the contractor is disproportionate to the amount at issue.

To accomplish closeout of such contracts, sections 824 and 836 further authorize the following:

- A contract or groups of contracts covered by these sections to be closed out through a negotiated settlement with the contractor.
- The remaining contract balances to be offset with balances within the contract or on other contracts regardless of the

year or type of appropriation obligated to fund each contract or contract line item, and regardless of whether the appropriation has closed.

When using this authority, the closeout procedures require the contracting officer to issue a modification of the affected contract, which must be signed by both the contractor and the Government. When closing out a group of contracts, the contracting officer must issue a modification for at least one of the affected contracts that reflects the negotiated settlement for the group of contracts and this modification must be signed by both the contractor and the Government. The remaining contracts in the group may be modified without obtaining the contractor's signature.

## **II. Discussion and Analysis**

This rule proposes to amend DFARS 204.802 to incorporate the expedited closeout authority and procedures provided by section 824 and 836 for contracts entered into on a date that is at least 17 fiscal years before the current fiscal year, that have no further supplies or services due under the contract, and where the appropriate determination has been made by an individual at least one level above the contracting officer.

## **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select

regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **IV. Executive Order 13771**

This rule is not an Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, regulatory action, because this rule is not significant under E.O. 12866.

#### **V. Regulatory Flexibility Act**

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, et seq., because the scope of rule is limited to contracts awarded at least 17 years before a current fiscal year that still require final closeout by the Government. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 836 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328), as modified by section 824 of the NDAA for FY 2018, to permit expedited closeout of certain contracts entered into on a date that is at least 17 fiscal years before the current fiscal year.

The objective of this proposed rule is to implement section 836 of the NDAA for FY 2017, as modified by section 824 of the NDAA for FY 2018.

Using estimates from Department and Agency subject matter experts, approximately 11,300 contracts subject to this rule need to be closed out by the Government. Of these contracts, the Government estimates that 50 percent, or 5,650, of the awards were made to small businesses.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the requirements of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018-D012), in correspondence.

#### **VI. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Part 204**

Government procurement.

**Amy G. Williams,**

Deputy, Defense Acquisition Regulations System.

Therefore, 48 CFR part 204 is proposed to be amended as follows:

#### **PART 204—ADMINISTRATIVE MATTERS**

1. The authority citation for part 204 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Amend section 204.804 by—

- a. In paragraph (1), removing "Contracting officers" and adding "Except as provided in paragraph (3) of this section, contracting officers" in its place; and
- b. Adding paragraph (3).

The addition reads as follows:

**204.804 Closeout of contract files.**

\* \* \* \* \*

(3)(i) In accordance with section 836 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328) and section 824 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), contracting officers may close out contracts or groups of contracts through issuance of one or more modifications to such contracts without completing a reconciliation audit or other corrective action in accordance with FAR 4.804-5(a)(3) through (15), as appropriate, if each contract—

(A) Was entered into on a date that is at least 17 fiscal years before the current fiscal year;

(B) Has no further supplies or services due under the terms of the contract; and

(C) Has been determined by an individual, at least one level above the contracting officer, to be not otherwise reconcilable, because—



(1) The contract or related payment records have been destroyed or lost; or

(2) Although contract or related payment records are available, the time or effort required to establish the exact amount owed to the U.S. Government or amount owed to the contractor is disproportionate to the amount at issue.

(ii) Any contract or group of contracts meeting the requirements of paragraph (3)(i) of this section may be closed out through a negotiated settlement with the contractor. Except as provided in paragraph (3)(ii)(B), the contract closeout process shall include a bilateral modification of the affected contract, including those contracts that are closed out in accordance with a negotiated settlement.

(A) For a contract or groups of contracts, the contracting officer shall prepare a negotiation settlement memorandum that describes how the requirements of paragraph (3)(i) have been met.

(B) For a group of contracts, a bilateral modification of at least one contract shall be made to reflect the negotiated settlement for a group of contracts, and unilateral modifications may be made, as appropriate, to other contracts in the group to reflect the negotiated settlement.

(iii) For contract closeout actions under paragraph (3) of this section, remaining contract balances—

(A) May be offset with balances in other contract line items within the same contract, regardless of the year or type of appropriation obligated to fund each contract line item and regardless of whether the appropriation obligated to fund such contract line item has closed; and

(B) May be offset with balances on other contracts, regardless of the year or type of appropriations obligated to fund each contract and regardless of whether such appropriations have closed.

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